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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM H. DENNLER, *et al.*,

Petitioners,

v.

ROBERT S. TRIPPET, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, for purposes of the one-year limitations period of Section 13 of the Securities Act of 1933, a securities issuer's rescission offer implemented in settlement of an SEC enforcement action operates, as a matter of law, to put investors (including investors in subsequent securities offerings) on notice of a wholly distinct fraudulent scheme perpetrated by the issuer, where (a) the limited violations of law alleged by the SEC have seemingly been cured by the rescission offer prospectus, (b) no other evidence of fraud by the issuer is apparent, and (c) the jury specifically found that such investors could not with reasonable diligence have discovered the fraud until 28 months later.

2. Whether the doctrine of equitable estoppel enunciated by this Court in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), is inapplicable as a matter of law to cases subject to Section 13 of the Securities Act of 1933.

PARTIES TO THE PROCEEDING

Petitioners in this Court are William H. Dennler, John D. Lockton, Peter G. Powers, Peter P. Luce, William D. Robertson, Thomas H. Thorner, William Grohne, Beatrice B. Warren, Joseph C. Bennett, Estate of Hoyt Ammidon, Fred J. Borch, Joseph A. Buda, Estate of Arthur M. Bueche, Estate of Thomas S. Gates, Hubert W. Gouldthorpe, Earl D. Hilburn, Joseph E. Horak, Francis K. McCune, Estate of J. Stanford Smith, and Hicks B. Waldron. The first nine petitioners named petition on their own behalf and as representatives of nine classes of investors certified by the trial court pursuant to Rule 23, Fed. R. Civ. P. Respondents in this Court (defendants-appellants below) are Robert S. Trippet, Helen E. Thomas as Personal Representative of the Estate of Frank E. Sims, Elmer M. Kunkel, Wynema A. Cross as Executrix of the Estate of Norman C. Cross, Jr., Cross & Company and Kothe & Eagleton, Inc. All other parties named in the caption of the opinions below (App. 1a-23a, App. 56a-79a) are either defendants who have settled and been dismissed or plaintiffs who were either former class representatives or whose individual claims were dismissed voluntarily before trial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals (App. 1a-50a[1]) is reported at 939 F.2d 1420 and the order denying petitioners' motion for rehearing (App. 51a-55a) is reported at 947 F.2d 897. The opinion of the

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[1] App. refers to the separately bound appendix to this petition for a writ of certiorari.

court of appeals on remand from this Court (App. 56a-95a) is reported at ___ F.2d ___, 1992 WL 201143. The order of the court of appeals denying respondent Trippet's petition for rehearing (App. 96a-97a) is unreported and the opinion of the court of appeals denying in part and granting in part the motion for rehearing of the remaining respondents (App. 98a-108a) is reported at ___ F.2d ___, 1992 WL 300892. The order of the district court entered October 17, 1988 rejecting respondents' statute of limitations defenses (App. 109a-111a) is unreported. The final judgment of the district court entered November 16, 1989 (App. 112a-127a) is reported at [1989-90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,970.

JURISDICTION

The decisions of the court of appeals denying rehearing and denying in part and granting rehearing in part were made on September 10, 1992, and October 23, 1992, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution; and Sections 11 and 13 of the Securities Act of 1933, 15 U.S.C. §§ 77k and 77m.

STATEMENT

1. From 1964 through 1972, Home-Stake Production Company sold interests in annual oil and gas development programs to numerous investors

throughout the United States.[2] Each annual program was organized as a joint venture between the investors and a newly-created Home-Stake subsidiary (Joint Br., A-3, ¶¶ 69-71).[3] Home-Stake and its officers, particularly its chief executive officer, respondent Trippet, exercised complete control over these subsidiaries (Joint Br., A-3, ¶ 44). Although the subsidiaries nominally organized and operated the programs, they had no employees of their own.

Home-Stake registered with the SEC the interests offered to investors in each annual program (Joint Br., A-3, ¶ 71). The programs were sold pursuant to prospect uses that contained descriptions of mineral properties proposed to be developed, tables showing the purported results of prior programs, and audited financial statements of the offerors (Exs. RD 385-93). In addition, Home-Stake routinely furnished investors with copies of its annual reports, unregistered sales literature setting out projected investment returns, and, beginning in 1967, evaluation reports from purportedly independent petroleum geologists showing values for each annual program well in excess of its purchase price (T. 165-67, 223-25, 250-53, 1422-23; Exs. RD 1-8, RD 49-57, RD 318-83).

Unknown to investors, virtually none of the development work on any Home-Stake program ever took

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[2] Citations to the record below are as follows. A stipulation of undisputed facts among the parties, which was given to the jury, was attached to respondents' joint brief in the court of appeals and is cited as Joint Brief, A-3, ¶ ___. The trial transcript is T. ___ and trial exhibits are Ex. ___. Pleadings filed in the district court are cited by docket number as Doc. ___.

[3] The dates and amounts of program interests purchased by the petitioners herein were stipulated. Joint Br., A-3, ¶¶ 1-37.

place (T. 423-32, 464-65, 505-15, 3351-55; Exs. 250, 292, 1254), and every program lost money continuously from its inception through the date of Home-Stake's bankruptcy in September 1973 (T. 1163-71; Exs. K-37A - K-42). Nevertheless, Home-Stake sent investors quarterly checks representing their purported share of profits from oil production, secretly charging those payments to the programs' development budgets (T. 742-48, 837-38, 1165-66, 1170, 1181, 1199). By using development monies to pay investors fictitious profits, Home-Stake in substance operated an elaborate Ponzi scheme in which funds invested in one program were returned either to those investors or to investors in prior programs (T. 1184-86, 1192, 1218).

Home-Stake disclosed none of its scheme to prospective investors, to the SEC or to the IRS (which would have disallowed the intangible drilling cost deductions that Home-Stake falsely advised investors they could claim). Instead, Home-Stake continually furnished its investors with fictitious production reports, bogus descriptions of drilling activities (Exs. RD 62-296; T. 233-38, 624-25, 1417), inflated program valuations (Exs. RD 318-83), and false audited financial statements showing increased income and net worth from mineral development (Exs. RD 48-57; T. 1198-1248). Home-Stake likewise filed fraudulent registration statements annually with the SEC, showing increased payouts of nonexistent oil revenues to investors in prior programs (T. 1171-79, 1242-43).

2. In 1970 the SEC learned that Home-Stake had sold more than the registered number of interests in its 1970 Program (which was located in Venezuela) and had used, in selling those interests, an unregis-

tered "program book" containing unsupported income projections and reserve estimates (T. 1442-44, 1513-15). In February 1971, the SEC sued Home-Stake and certain of its officers and directors, including respondents Trippet and Kunkel, its then chief financial officer, alleging violations of the registration and antifraud provisions of the securities laws (Ex. RD 657). Specifically, the SEC challenged (a) the sale of more than the maximum number of 914 registered units in the 1970 Program; (b) unsupported estimates of oil reserves and future income for the 1970 Program; and (c) Home-Stake's failure to comply with an undertaking not to accept payment for units in the 1970 Program until a post-effective prospectus amendment was delivered to investors (*Id.*). Respondents Cross and Sims were not sued by the SEC and respondents Kothe & Eagleton and Cross & Company had yet to provide any services to Home-Stake as of the date of the SEC suit.

In April 1971, Home-Stake and its co-defendants agreed to settle the SEC suit by making a rescission offer to investors in the 1970 Program. The settlement was embodied in a consent decree whereby defendants agreed (a) to reduce the 1970 Program to its originally registered size; (b) to eliminate income projections for the 1970 Program and to provide a reduced reserve estimate prepared by a petroleum engineer acceptable to the SEC; (c) to circulate to investors in the 1970 Program a revised prospectus accurately describing the program and the rescission offer; and (d) not to violate the securities laws in the future (Ex. RD 659). As ordered by the district court, the rescission offer prospectus was mailed on April 30, 1971, to investors in the 1970 Program (Ex. RD 410).

Home-Stake subsequently advised the SEC that enough investors had accepted the rescission offer to reduce the 1970 Program to its originally registered size, with more than 600 investors holding $18,280,000 of interests (914 units) electing to continue their investment (Ex. RD 386 at 43, Ex. 450B).

The 1971 SEC suit contained no allegations concerning Home-Stake's 1964-1969 Programs (which were located in California, not Venezuela), no allegations concerning any aspect of the Home-Stake Ponzi scheme, and no allegation of inaccuracies in Home-Stake's audited financial statements (Ex. RD 657). (In part, this was due to false and misleading information that respondents submitted to the SEC during its investigation (T. 1046, 1063-65; Exs. 2618, 2640, 3832).) In any event, the specific wrongs the SEC had alleged—oversales of interests in, and unsupported estimates of income and reserves for, the 1970 Program alone—were purportedly cured by the rescission offer prospectus, which was accepted by the SEC and the district court as satisfying the consent decree (Exs. RD 407, RD 410, RD 659).

Between early November and late December 1971, Home-Stake registered with the SEC and sold to more than 400 investors interests in a new 1971 Program (Ex. RD 386; Ex. 450B). Between early October and late December 1972, Home-Stake registered with the SEC and sold to more than 130 investors interests in its 1972 Program (Ex. RD 385; Schedules Attached To Final Judgment entered November 16, 1989, Vol. 2, 1972 Class). The prospectuses for the 1971-1972 Programs included a brief description of the SEC action, the ensuing consent decree, and the rescission offer for the 1970 Program (Exs. RD 385, RD

386). Neither prospectus disclosed Home-Stake's Ponzi scheme, continued unabated, or the fact that Home-Stake was insolvent. (*id.*).

3. On March 30, 1973, three investors (including Ivan Anixter, the original named plaintiff) brought this securities fraud class action against Home-Stake on behalf of investors in the 1965-1971 Programs. (Originally filed in California, the case was later transferred to the United States District Court for the Northern District of Oklahoma.) (App. 25a). In September 1973, the SEC sued Home-Stake and, for the first time, alleged the existence of the Home-Stake Ponzi scheme (N.D. Okla., Case No.73-C-306, filed 9/11/73). In settlement of that SEC suit, on September 20, 1973, Home-Stake filed for reorganization under the bankruptcy laws (N.D. Okla., Case No. 73-B-922) (T. 3472). In May 1974, the *Anixter* complaint was amended by adding claims on behalf of investors in the 1964 and 1972 Programs, adding additional representative plaintiffs, and adding defendants including respondents Sims, Kothe & Eagleton, Inc. (securities counsel in the 1971 Program offering) and Cross & Company (auditors of the Home-Stake financial statements included in the 1972 Program prospectus) (Doc. 60).

In 1976, the *Anixter* suit was certified as a class action on behalf of nine separate classes, respectively comprising investors in each of Home-Stake's annual programs from 1964 through 1972. *In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 351 (N.D. Okla. 1977). Following a five-week jury trial in the summer of 1988, the jury found respondents liable for violations of Section 11 of the Securities Act of 1933 ("the 1933 Act"), 15 U.S.C. § 77k, Section 10(b)

of the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5 (App. 112a-127a).[4] The jury also answered two sets of special interrogatories concerning the statute of limitations. First, the jury found that for each group of claims against each defendant, the applicable class representative did not discover, and with the exercise of reasonable diligence could not have discovered, the factual basis for his or her claim prior to September 1973, when the second SEC lawsuit was filed and Home-Stake entered bankruptcy proceedings (App. 130a-198a). Second, the jury found that respondents Trippet, Kunkel and other Home-Stake officers intended to and did thwart the federal courts, the SEC and the IRS in the performance of their official duties (App. 128a-129a).

Based on these jury findings, the district court ruled that the *Anixter* actions were not barred by the applicable statutes of limitations (App. 109a-111a). In the alternative, based in part on the jury's finding that defendants had "intentionally thwarted and defeated the federal courts, the SEC and the IRS in their efforts to administer and enforce the laws of the United States," the court held that "defendants are estopped from raising statute of limitations defenses to the claims asserted against them" (App. 110a-111a).[5] In November 1989, following a three-day

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[4] The jury found that Kunkel, as an accountant, was not liable for violations of Section 10(b) to the 1964, 1965 and 1966 classes, but was liable to those classes under Section 11.

[5] The court made similar findings with respect to the federal securities law and common-law negligence claims advanced in individual actions (the "*Anderson* actions") filed in April and May 1974 by those petitioners who are not *Anixter* class mem-

jury trial on damages, the district court entered judgments for petitioners and the classes they represent aggregating in excess of $130 million (App. 112a-127a).

4. The Tenth Circuit reversed, ruling that petitioners' claims were time-barred and directing the district court to dismiss the case (App. 1a-50a). With regard to petitioners' claims under Section 11 of the 1933 Act, the court of appeals ruled (a) that the claims of the 1964-1969 investor classes were barred by the "absolute" three-year statute of limitations contained in Section 13 of the 1933 Act; and (b) that the claims of the 1970-1972 investor classes were barred, "as a matter of law," by the one-year statute of limitations contained in Section 13 of the 1933 Act, because investors in those programs were assertedly placed on "inquiry notice" of their claims in April 1971 by the SEC suit and rescission offer prospectus involving the 1970 Program (App. 32a-47a).

As for petitioners' claims under the 1934 Act, the Tenth Circuit ruled that, under this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991), petitioners' Section 10(b) claims were no longer governed by the applicable Oklahoma statute of limitations (two years from the date petitioners discovered or should have discovered the fraud). Rather, the Tenth Circuit held that *Lampf, Pleva* required petitioners' Section 10(b) claims to be assessed under the uniform federal statute of limitations set forth in Section 13 of the 1933

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bers. *See* App. 109a. Since the contentions of the individual petitioners generally track those of the class petitioners, we will, for reasons of simplicity, refer to them collectively as "petitioners."

Act. Applying that Section's three-year and one-year limitations periods, the court of appeals ruled that the Section 10(b) claims of the 1964-1969 and the 1970-1972 investor classes were respectively time-barred (App. 47a-50a).

Supported by the SEC as amicus curiae, petitioners sought rehearing and rehearing en banc. The Tenth Circuit granted rehearing "in order to clarify [its] prior opinion" in two respects (App. 52a). First, the court amended its discussion of Section 10(b), ruling that petitioners' claims thereunder were barred by the three-year/one-year limitations provisions of Section 9(e) of the 1934 Act, given the "substantial similarity" between Section 9(e) and Section 13 (App. 52a-54a). Second, the court expressly ruled that this Court's decision in *Lampf, Pleva* was to be applied retroactively (App. 54a-55a).

5. On December 19, 1991, the President signed into law the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (1991). Section 476 of that Act, 105 Stat. 2387, added to the 1934 Act a new Section 27A, 15 U.S.C. § 78aa-1 (Supp. III 1991), which provides in pertinent part that the limitations period for any pending Section 10(b) action commenced on or before June 19, 1991—the day prior to this Court's decision in *Lampf, Pleva*—"shall be the limitation period provided by the laws applicable in the jurisdiction * * * as such laws existed on June 19, 1991" (App. 206a). The stated purpose of Section 27A was to render this Court's decision in *Lampf, Pleva* nonretroactive in its application to Section 10(b) claims. *See* 137 Cong. Rec. H11810-H11813 (daily ed. Nov. 26, 1991) (statements of Congressmen Dingell and Markey); 137 Cong. Rec. S17315 (daily ed.

Nov. 21, 1991) (statement of Senator Riegle); 137 Cong. Rec. S 18624 (daily ed. Nov. 27, 1991) (statement of Senator Bryan).

On December 24, 1991, petitioners moved the Tenth Circuit to recall its mandate, grant rehearing to consider the effect of Section 27A, and reinstate their Section 10(b) claims and judgments. On January 6, 1992, the Tenth Circuit denied the motion without briefing, argument or opinion and petitioners thereafter filed a timely petition for a writ of certiorari.

6. On April 20, 1992, this Court granted the writ, vacated the judgment below and remanded the case to the court of appeals "for further consideration in light of Section 27A of the Securities and Exchange Act of 1934", 112 S.Ct. 1658. After further briefing, in an opinion filed August 24, 1992, the Tenth Circuit ruled that in enacting Section 27A Congress properly exercised its legislative function and that, under Section 27A, petitioners' Section 10(b) claims were not barred by the applicable Oklahoma statute of limitations. Accordingly, the court of appeals reinstated all petitioners' Section 10(b) judgments (App. 90a). The Tenth Circuit did not change those aspects of its earlier opinions which held petitioners' Section 11 claims all time-barred.

7. The respondents other than Sims thereupon sought rehearing. The petition of respondent Trippet was denied by Order dated September 10, 1992 (App. 97a). The petitions for rehearing of the remaining respondents were denied in part and granted in part with a limited remand to the district court in an opinion of the Tenth Circuit dated October 23, 1992 (App. 98a-108a). The remand to the district court was for the entry of additional findings on (i) the statute

of limitations defense of respondent Kothe & Eagleton to the Section 10(b) claims of the 1971 class and (ii) the district court's award of prejudgment interest against all respondents, all to be made in accordance with the guidance provided in the opinion of the Tenth Circuit.

8. The respondents other than Trippet and Sims have moved in the Tenth Circuit for a stay of mandate and have moved in this Court for an extension of time within which to file a petition for a writ of certiorari. On November 4, 1992, Justice White granted respondents an extension until December 23, 1992.

9. This petition seeks review of two holdings by the Tenth Circuit resulting in the reversal of all petitioners' judgments under Section 11 as time-barred.[6]

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[6] Common law negligence judgments under Oklahoma law were rendered against respondents Cross and Kunkel in the individual *Anderson* actions (App. 120a-126a), based on jury verdicts which rejected their statute of limitations defenses (T. 4260-62, 4301-02). Cross did not appeal those judgments in her brief to the Tenth Circuit. Kunkel argued only that each of the *Anderson* plaintiffs failed to present evidence supporting the jury's rejection of Kunkel's statute of limitations defense (Individual Brief of E.M. Kunkel at 7-8; Individual Reply Brief of E.M. Kunkel at 6-7). Petitioners showed without contradiction that under Oklahoma law, *Knudson v. Weeks*, 394 F. Supp. 963, 971-72 (W.D. Okla. 1975), the statute of limitations for negligence was tolled by Kunkel's fraudulent concealment (Appellees' Brief at 67-68). Although the Tenth Circuit never specifically addressed this issue, a footnote in its original opinion (appended to a discussion of the three-year statute of repose contained in Section 13 of the 1933 Act) could possibly be read as reversing the *Anderson* plaintiffs' negligence judgments against Cross and

REASONS FOR GRANTING THE PETITION

1. The Tenth Circuit erred in its application of "inquiry notice" principles to bar the claims of investors in the 1970-1972 Programs under Section 11 of the 1933 Act. At trial, the jury specifically found that petitioners, in the exercise of reasonable diligence, could not have discovered the facts underlying Home-Stake's Ponzi scheme prior to September 1973. The Tenth Circuit overturned the jury's finding, ruling, as a matter of law, that petitioners were on "inquiry notice" of the fraud practised upon them as of April 30, 1971. That was the date on which Home-Stake's rescission offer prospectus, disclosing the first SEC suit and subsequent consent decree, was mailed to investors in the 1970 Program.[7] According to the

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Kunkel as well as their Section 11 and Section 10(b) judgments (App. 39a n.30). Accordingly, as a protective measure, petitioners also request this Court to reverse the Tenth Circuit's decision to the extent it can be interpreted to overturn petitioners' negligence judgments against respondents Cross and Kunkel as lacking any basis in law or fact because (i) Cross never appealed those judgments, (ii) Kunkel did not claim on appeal that the Oklahoma statute of limitations was not tolled by fraudulent concealment and (iii) any implied holding that the 1964 through 1966 *Anderson* plaintiffs were on notice of their negligence claims against Kunkel more than two years prior to the date suit was filed is inconsistent with the Tenth Circuit's reinstatement of the 1964 through 1966 *Anixter* plaintiffs' Section 10(b) claims against respondent Trippet (which are likewise subject to a 2-year statute of limitations taken from Oklahoma law—*see* App. 100a).

[7] A literal application of the Tenth Circuit's original holding to the 1971 and 1972 investor classes would result in the 1971 investors being deemed to have "inquiry notice" of Home-Stake's fraud six months before they bought their securities, and in the 1972 investors being *time-barred* before they made their initial

Tenth Circuit, the SEC complaint and rescission remedy represented " 'great glowering clouds' * * * sufficient to put plaintiffs on notice that something was amiss" (App. 43a). "However incomplete that notice might have been," the court ruled, "it encompassed enough of a 'storm warning' to start the clock as a matter of law" (App. 47a). The court accordingly held that the Section 11 claims of the 1970-1971 Program investors, filed on March 30, 1973, were time-barred by the one-year limitations period of Section 13.

The court of appeals also held that the Section 11 claims of the 1972 Program investors, filed on May 24, 1974, were time-barred because they were "tethered to a nullity," *i.e.*, the time-barred *Anixter* action. Alternatively, the Tenth Circuit held that the 1972 claims were time-barred by the one-year provision of Section 13 because the filing of the *Anixter* action fourteen months earlier put the 1972 investors on notice as a matter of law. In its alternative holding, the court of appeals simply ignored the fact that no 1972 investor was a plaintiff in the original *Anixter* action and that there was no evidence in the record that the 1972 class representative Joseph Bennett or any other 1972 class member was aware of the filing of the *Anixter* action more than 12 months prior to May 24, 1974. The jury expressly found that Joseph Bennett should not have discovered his Section 11 claims against respondents Trippet, Sims and Cross & Company until September 1973 (App. 179a-181a).

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investments. In its later opinion on rehearing the Tenth Circuit indicated that the investors in the 1971 and 1972 Programs were to be deemed to have inquiry notice on the date of their investments in those programs (App. 99a).

The court of appeals plainly erred in ignoring the express findings of the jury and the district court and substituting its own view of the inferences to be drawn from the SEC enforcement action. The February 1971 SEC suit related solely to the offering and sale of units in Home-Stake's 1970 Program. That suit contained no allegations about Home-Stake's 1964-1969 Programs, no allegations about Home-Stake's 1971-1972 Programs (which did not yet exist), and no allegations about any aspect of the Ponzi scheme that forms the basis of petitioners' case. Indeed, respondents Kothe & Eagleton and Cross & Company had not been retained by Home-Stake nor had they performed any services for any Home-Stake company at the time of the SEC suit. While respondent Norman Cross was the auditor for Home-Stake in connection with its 1969 and 1970 programs, he was not implicated in the 1971 SEC suit.[8] The settlement of the SEC action by Home-Stake's circulation of a rescission offer prospectus to all appearances cured the limited violations—oversales of units in, and overestimates of reserves and income from, the 1970 Program—of which the SEC had complained.

In determining that the 1971 SEC litigation put investors on notice of the wholly distinct fraud alleged here, the Tenth Circuit in effect holds that once an investor learns that the SEC has compelled an issuer to correct any securities law violation, that investor is on notice, as a matter of law, that any subsequent securities offering by that or any related issuer may

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[8] Cross did, however, provide false audited financial statements which were included in the rescission offer prospectus.

well be fraudulent for any reason. According to the Tenth Circuit, a securities law violation is a sort of original sin that taints an issuer's securities indefinitely. Any investor purchasing a subsequent issue has only one year to investigate the possibility of fraud in connection with such later offering, even if the issuer has cured its prior violation to the satisfaction of the SEC and the courts and there are no other facts suggesting fraud in the subsequent offering of the kind previously asserted or any other.

This holding flies in the face of common sense, subverts the policies of the federal securities laws, and improperly invades the province of the jury. In settling the 1971 SEC suit, Home-Stake agreed to correct all violations alleged by the SEC and to abide by a court injunction against future violations, breach of which was punishable by criminal contempt. Confronted with these facts, a rational investor could reasonably infer that Home-Stake's wrongdoing had been identified and cured. Indeed, more than 600 investors in the 1970 Program declined Home-Stake's rescission offer, and more than 500 persons subsequently decided to invest in its 1971-1972 Programs. And even if an investor could plausibly have read the SEC and court-approved rescission offer prospectus as the work of a chronic, rather than a repentant, sinner, the Tenth Circuit wholly failed to explain why that inference was so compelling that it was, as a matter of law, the *only* inference a trier of fact could permissibly draw.

The practical effects of the Tenth Circuit's decision will seriously compromise the policies of the federal securities laws. Any investor who purchases securities from an issuer that previously signed an SEC consent

decree will be deemed on "inquiry notice" of fraud from the moment of his purchase, leaving him just 12 months to investigate the possibility of fraud and bring suit if fraud is discovered. The virtual impossibility of meeting this deadline is shown by the record of this case. Following the April 1971 consent decree, it took the SEC, which receives quarterly filings from registrants and which has broad subpoena powers and a large staff of trained investigators, approximately $2^1/_2$ years to discover Home-Stake's Ponzi scheme and challenge it in court.

Given the unreasonableness of the Tenth Circuit's discovery deadline, investors will have strong incentives to avoid securities of issuers who have previously been the subject of SEC enforcement actions. The decision will thus impede free access to the capital markets by investors and issuers alike. To avoid jeopardizing their future securities offerings, issuers will have strong incentives not to settle cases with the SEC, conscious that a consent decree can become an indelible badge of fraud. And the practical consequences of the Tenth Circuit's holding, as the SEC explained in urging rehearing below, are even more unfortunate where the issuer is dishonest: "[T]he panel's holding, perversely and ironically, allows persons who have previously violated the securities laws and do so again to take advantage of a shorter statute of limitations than first-time wrongdoers" (SEC Amicus Br. 5 (filed Aug. 27, 1991)).

In holding that an SEC action puts investors on inquiry notice, as a matter of law, of unrelated frauds not alleged by the SEC, the decision below conflicts with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979).

An investor there sued accountants in July 1977 for falsely certifying an issuer's financial statements. The accountants raised in defense the applicable state two-year statute of limitations, contending that the investor was put on inquiry notice in June 1974, when the SEC brought market manipulation charges against the underwriters of the issuer's securities (609 F.2d at 588-589). The Second Circuit reversed the district court's dismissal of the complaint, holding that, because of conflicting inferences that could be drawn from these undisputed facts, summary judgment on the statute-of-limitations issue was improper (*id.* at 592-593). In so holding, the court emphasized that the SEC's June 1974 order had alleged no fraud by the accounting firm and that "it was not until 1976 that the SEC was able to name these accountants as participants in the fraud" (*id.* at 592). The Second Circuit went on to state (*ibid.*):

> If the SEC with its commendable expertise and specialized investigative teams was unable to discover the complicity of these accountants until shortly before its Opinion and Order of September 1, 1976 was released, it cannot be said as a matter of law that appellant should have discovered their participation any earlier.

In contrast, the Tenth Circuit has held herein that the 1971 SEC case, which was brought only against the issuers and their officers and directors, put investors on notice, as a matter of law, of wrongdoing by accountants not named in the SEC action and by Kothe & Eagleton, who were not retained as attorneys by Home-Stake until after the SEC case had been filed. The Tenth Circuit decision thus creates a pre-

sumption that all persons who represent a party sued by the SEC are tainted so as to start the immediate running of the statute of limitations with respect to work done by them on securities offerings made after the SEC suit. Such a presumption is unsupported by logic and law.

The Tenth Circuit's decision also conflicts with well-established principles governing appellate review of jury verdicts in securities law cases. The issue of when an investor should discover, in the exercise of reasonable diligence, a misstatement or omission in a securities offering, is generally a question of fact for the jury. *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984); *Robertson*, *supra*, 609 F.2d at 592-593. A court of appeals is barred by the Seventh Amendment from redetermining facts found by a jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-359 (1962). It is for the jury to judge the credibility of witnesses, weigh conflicting evidence, draw reasonable inferences from undisputed facts, and arrive at a conclusion. *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944). Moreover, in reviewing a jury verdict, this Court has held that courts of appeal are "bound to view the evidence [presented to the jury] in the light most favorable to [the prevailing party below] and to give it the benefit of all inferences which the evidence fairly supports even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690, 696 (1962).

Here the jurors saw the SEC's 1971 complaint, the ensuing consent decree, and Home-Stake's rescission offer prospectus. The jurors heard testimony from the

1970-1972 class representatives concerning their understanding of those events. And the jurors heard arguments from respondents' counsel urging the jury to draw the very inferences that the Tenth Circuit ultimately drew. The jury, however, found in answers to special interrogatories that the 1970-1972 class representatives neither discovered nor should have discovered the fraud in question until September 1973.[9]

For the Tenth Circuit to overturn this finding and resolve the notice issue as a matter of law was a usurpation of the jury's constitutional role as finder of the facts. This Court has repeatedly recognized that "the drawing of legitimate inferences from the facts are jury functions." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *Accord Continental Ore Co., supra*, 370 U.S. at 700-701, *Lavender v. Kurn*, 327 U.S. 645, 652-653 (1946).[10] And both the Second and the Ninth Circuits have specifically held that the question whether a plaintiff has exercised reasonable diligence in discovering fraud for statute of limitations purposes, where conflicting inferences may be drawn from otherwise undisputed facts, is a fact question to be decided by the jury. *Robertson v. Seidman & Seidman, supra*, 609 F.2d at 592-593; *Mosesian v. Peat, Marwick, Mitchell & Co., supra*,

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[9] Respondents did not appeal either the form of the jury instructions concerning the statute of limitations or the form of the special jury interrogatories. *See* Joint Br. 7-22.

[10] This Court has held that an appellate court must defer to the fact finder's role in drawing inferences from evidence even where the inference is drawn by the district court, whose determinations are subject to the more lenient "clearly erroneous" standard of review. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-574 (1985).

727 F.2d at 879. *Compare Byers v. Burleson*, 713 F.2d 856, 861-862 (D.C. Cir. 1983) (application of discovery rule in medical malpractice case).[11]

2. The Tenth Circuit also erred in its holding concerning equitable estoppel. In considering the timeliness of the Section 11 claims of the 1964-1969 investor classes, the court of appeals held that the doctrine of equitable estoppel, applied by the district court to bar respondents' reliance on the statute of limitations, "is not available to avoid the statute of repose established by Section 13" (App. 38a). The Tenth Circuit characterized Section 13 as erecting an "absolute bar" to Section 11 claims brought more than three years after the purchase of securities, citing dictum to this effect in *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2887 (1991).

In so holding, the Tenth Circuit refused to recognize the distinction, articulated in decisions of this Court and others, between equitable *tolling* and equitable *estoppel*. Equitable tolling is a doctrine which holds that "where the party injured by the fraud remains in ignorance of it without any fault or want

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[11] The cases that the Tenth Circuit cites to support its result involve situations where the plaintiffs at an early date had knowledge of substantially the same facts upon which they later based their claims. *See Kennedy v. Josephthal & Co.*, 814 F.2d 798 (1st Cir. 1987); *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978). Here, by contrast, the factual allegations underlying the 1971 SEC action and ensuing consent decree were entirely distinct from the fraudulent scheme that was the basis for the judgments overturned by the Tenth Circuit.

of diligence or care on his part, the bar of the [limitations] statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1875). *See also Holmberg v. Armbrecht*, 327 U.S. 392, 396-397 (1946). Because the one-year period of Section 9(e) of the 1934 Act is based on discovery of the facts constituting the fraud, this Court held in *Lampf, Pleva* that the three-year period of Section 9(e) is "a period of repose inconsistent with tolling" (111 S.Ct. at 2782). By a parity of reasoning, that conclusion also applies to Section 13 of the 1933 Act.

In contrast, equitable *estoppel* operates to prevent a defendant from raising an otherwise dispositive statute-of-limitations defense because of his inequitable conduct after the initial tort. *See* Bloomenthal, *The Statute Of Limitations And Rule 10b-5 Claims: A Study In Judicial Lassitude*, 60 U. Colo. L. Rev. 235, 291-292 (1989).[12] This Court applied the doctrine in an FELA case to estop a defendant from relying on a three-year statute of limitations, noting that the defendant had fraudulently induced the plaintiff not

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[12] Although utilizing the term fraudulent concealment rather than equitable estoppel, a recent law review article explores at length the long-standing distinction between equitable tolling of statutes of limitation for claims of fraud and the suspension of statutes of limitation for all kinds of claims, including fraud, that results from a defendant's separate conduct of fraudulently concealing from a plaintiff the acts giving rise to the claim. Johnson, *Securities Fraud And The Mirage Of Repose*, 1992 Wis. L. Rev. 607, 631-32 (1992). Professor Johnson roundly criticizes the Tenth Circuit's decision in this case for its "bungling of the tolling issue." *Id.* at 666-71.

to sue within the time prescribed by law. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). The Court explained that equitable estoppel springs from "the maxim that no man may take advantage of his own wrong," a "deeply rooted" principle that "has frequently been employed to bar inequitable reliance on statutes of limitations" (395 U.S. at 232-233).

Addressing the three-year limitations period at issue here, Professor Bloomenthal has explained that

> Equitable estoppel, properly understood, is not inconsistent with the fact that Congress intended the periods of limitation to be absolute. The Congress was attempting to assure directors and others that, after a period of time, no action would be brought against them for allegedly false statements made in a registration statement or otherwise in connection with the sale or purchase of a security. Congress was not saying that by their own subsequent conduct they could not, in effect, extend the period of limitation. It is critical, however, to the application of such doctrine that it be some act other than the events that constitute the basis for the claim that reasonably caused the plaintiff to forbear from asserting his claim.

Bloomenthal, *supra*, 60 U. Colo. L. Rev. at 292.

Thus, in interpreting the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. § 1711, which contains a three-year statute of limitations substantially identical to that of Section 13, the Seventh Circuit applied *Glus* to hold that a defendant could be

equitably estopped from relying on a limitations defense, notwithstanding that equitable tolling was unavailable. *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978). And the Second Circuit applied equitable estoppel to prevent a defendant from relying on Section 13's requirement that a Section 12(1) action be brought within one year after the underlying violation was committed. *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1054-1055 (2d Cir. 1969).[13]

In this case, respondents committed numerous independent fraudulent acts over the nine years from 1965 to 1973 to prevent both petitioners and the members of the investor classes they represent, as well as the SEC, the IRS and the federal courts, from discovering the initial fraud in the sale of the Home-Stake 1964 through 1969 Programs. For example, respondent Trippet personally directed the making of Ponzi payments by Home-Stake every quarter through February of 1973 to conceal the absence of program development and the lack of profitable operations (T.

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[13] Equitable estoppel has been applied by the courts of appeals, in a variety of contexts, to prevent defendants from enjoying the benefit of the running of a statute of limitations procured by fraud. *E.g.*, *Cange v. Stotler & Co.*, 826 F.2d 581, 587 (7th Cir. 1987) (Commodity Exchange Act); *United States v. Fidelity & Deposit Co.*, 813 F.2d 697, 700 (5th Cir. 1987) (Miller Act); *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983) (ILSFDA); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975) (ADEA); *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946, 948 (3d Cir. 1971) (Jones Act); *United States v. Prince-McNemar Construction Corp.*, 320 F.2d 663, 665-666 (9th Cir. 1963) (Miller Act); *Scarborough v. Atlantic Coast Line R.R.*, 178 F.2d 253, 258 (4th Cir. 1949), *cert. denied*, 339 U.S. 919 (1950) (FELA).

742-46, 837-38). Trippet and respondent Sims authored the fictitious program operations reports mailed monthly or quarterly to investors (T. 233-38, 624-25, 1416-20). Trippet also orchestrated the annual preparation and distribution to investors of fraudulent valuation reports on the 1964 through 1969 Programs (T. 1421-25) and, over the years, authored literally hundreds of letters to class members providing false answers to questions raised by them concerning program distributions and operations (*E.g.*, Exs. 179, 911, 1731, 3182, 3386, 5052). Respondents Kunkel and Cross participated in the preparation and dissemination to 1964 through 1969 investors of fraudulent financial statements contained in Home-Stake's annual reports from 1964 through 1972 (Exs. RD 48-57).

In addition, from 1964 through 1972, each successive program registration statement was submitted to the SEC with false and misleading information about Home-Stake and its prior programs (*E.g.*, Exs. RD 394-430). Moreover, equally false annual reports on Form 10-K for each program were likewise filed with the SEC for each year (Exs. RD 485-504). Respondents Trippet, Sims, Kunkel and Cross either signed those fraudulent filings or audited false financial statements contained therein.[14] Finally, in connection with the 1970 Program rescission offer, respondents Trippet, Sims, Kunkel and Cross misled

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[14] During the 1970-71 SEC investigation of Home-Stake, respondent Kunkel testified falsely under oath to the SEC about a purportedly independent equipment supplier (which was in fact a sham corporation organized by Trippet to defraud investors and the IRS) (Ex. 2618) and made false written representations to the SEC about the value of Home-Stake's major asset (a worthless multi-million dollar receivable) (Ex. 2640).

investors, the SEC and the federal district court in 1971 by preparing and disseminating the fraudulent rescission offer prospectus (which included false Home-Stake financial statements) in blatant violation of the consent degree thereby continuing the concealment from all parties of the Home-Stake Ponzi scheme.[15]

Based on this conduct, the jury answered special interrogatories finding that Home-Stake and its officers (including respondents Trippet and Kunkel), intentionally prevented the SEC, the IRS, and the federal courts from discovering the fraudulent sales of securities of which petitioners complain (App. 128a-129a). The trial court concurred and ruled that defendants were equitably estopped from raising statute of limitations defenses to petitioners' Section 11 and Section 10(b) claims (App. 110a-111a). The Tenth Circuit did not dispute that the evidence of defendants' fraudulent post-sale conduct summarized above and the jury's findings based thereon laid the factual predicate for the district court's invocation of equitable estoppel. Rather, the court held the doctrine inapplicable as a matter of law, asserting that its invocation here would "operate[] to trump a clear outer limit intended by Congress" (App. 38a).[16] Yet as Professor Bloomenthal has pointed out, "the legislative history [of the 1933 Act] makes it clear that

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[15] Three years earlier, Trippet had secretly settled a securities fraud class action in violation of Rule 23(e), Fed. R. Civ. P. (App. 26a n.2).

[16] In its decision, the Tenth Circuit relied in part on this Court's decision in *Lampf, Pleva* (App. 37a n.22). As Professor Johnson has demonstrated, that is simply a misreading of *Lampf, Pleva*. Johnson, *supra*, 1992 Wis. L. Rev. 607, 662-71 (1992).

Congress intended the absolute bar to relate to the fraud itself and not to subsequent steps to conceal it." Bloomenthal, *supra*, 60 U. Colo. L. Rev. at 294. *Accord* Johnson, *supra*, 1992 Wis. L. Rev. 656-62 (1992).[17]

In sum, the Tenth Circuit has interpreted Section 13 to bar the application of equitable estoppel principles in a manner that conflicts both with this Court's decision in *Glus* and with the decisions of other circuits interpreting statutes of limitation having comparable language and purpose. In effect, the Tenth Circuit has turned an ancient adage on its head and adopted the principle that, for cases under Section 13, two wrongs make a right for defendants. Certiorari should be granted to correct the court of appeals' error which, if allowed to stand, would unjustifiably reward securities law violators for the

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[17] The policy of "repose" weighted so heavily by the Tenth Circuit is no more important than the policy of "finality of judgments." Yet this Court has held that the finality of a judgment must give way to the equitable power of a court to prevent a party from taking advantage of fraud. Thus, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-246 (1944), the Court used its equity power to vacate a final judgment for patent infringement procured by a party through "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Accord S&E Contractors, Inc. v. United States*, 406 U.S. 1, 15 (1972). Application of this equitable power, moreover, is not confined to situations involving fraud on the courts. *See Alberta Gas Chemicals, Ltd., v. Celanese Corp.*, 650 F.2d 9, 13 (2d Cir. 1981) (vacating administrative decisions procured by fraud on agency); *Toscano v. Commissioner*, 441 F.2d 930 (9th Cir. 1971) (sanctioning fraud on the IRS and the Tax Court); *United Business Communications, Inc. v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1187-1188 (D. Kan. 1984) (vacating prior judgment).

success of their ongoing efforts in actively concealing from investors and government agencies their fraudulent sales of securities.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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